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In the
Supreme Court of the United States
October Term, 1965

HARRY R. SMITH,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Maurice J. Walsh
105 West Adams Street
Chicago, Illinois, 60603

Anna R. Lavin
53 West Jackson Boulevard
Chicago, Illinois, 60604
Attorneys for Petitioner

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, Harry R. Smith, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Eighth Circuit in the case there entitled, *Harry R. Smith, Appellant,* v. *United States of America, Appellee,* No. 18,091, Civil.

JUDGMENT AND OPINION OF THE COURT BELOW

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on February 23, 1966,

and is reported at 356 F.2d 868; it appears in the printed Appendix filed herein and in the record filed simultaneously herewith, and certified by, the Clerk of the United States Court of Appeals for the Eighth Circuit.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Eighth Circuit, affirming the judgment of the United States District Court for the Southern District of Iowa was filed on February 23, 1966. This Petition is filed within 90 days thereafter. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals for the Eighth Circuit err in holding that *all* of the property of state banks—only the deposits of which are covered and insured by the Federal Deposit Insurance Corporation—are protected under Federal law by the provisions of Section 2113(a)?

2. Has the Court of Appeals for the Eighth Circuit engrafted a limitation on Section 2113(a) clearly not intended by Congress?

3. Did this Court's decision in *Westfall* v. *United States*, 274 U.S. 256, relating to a nationally chartered bank control acts performed on the premises of a State chartered bank?

4. Can a prosecutor by the device of pleading an entry into a bank with felonious intent enhance the penalty for the crime actually committed?

5. Does the entry with intent to commit a larceny merge into the larceny shown to have been accomplished?

STATUTE INVOLVED

Title 18, U.S.C., Section 2113(a) and (b) reads as follows:

"(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or

"Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part, as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association, and in violation of any statute of the United States, or any larceny—

"Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

"(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

"Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

Tenth Amendment to the Constitution of the United States:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATEMENT OF THE CASE

Petitioner, Harry R. Smith, together with one Frank Anthony Dalia, was named a defendant in an indictment returned in the Southern District of Iowa, Central Division, No. 4-903 Criminal. The body of the indictment reads as follows:

> "The Grand Jury Charges:
>
> "That on or about October 22, 1962, at Altoona, Iowa, in the Southern District of Iowa, the Defendants Harry R. Smith and Frank Anthony Dalia, aka Anthony Walters, entered the Altoona State Bank, Altoona, Iowa, the deposits of said bank being then and there insured by the Federal Deposit Insurance Corporation, with intent to commit a felony, to wit, a larceny, in violation of Section 2113 (a), Title 18, United States Code."

Petitioner's Co-defendant, Frank Anthony Dalia, entered a plea of guilty pursuant to Rule 20 of the Federal Rules of Criminal Procedure in Indiana. This petitioner, Harry R. Smith, entered a plea of not guilty, and, on the indictment and the plea, went to trial before a jury.

The evidence, taken in the light most favorable to the Government showed that on or about the 22nd day of October, 1963, the Altoona State Bank in Altoona, Iowa, had been entered, in the absence of all bank personnel, and money and property taken therefrom in the approximate value of $6,000.00, most of which property was subsequently recovered in and about the highway leading eastward from Altoona.

In the course of the trial, the Government proposed as a Court's witness the Co-defendant Dalia. As a witness

he repeatedly invoked his privilege against self-incrimination. He was compelled by the Court to admit to his guilty plea under questioning by the government. After the Court, at the suggestion of defense counsel, ascertained that the witness wanted the advice of a lawyer, and he did consult a lawyer over the evening recess, cross-examination by the defense continued the following day. The witness then stood mute. In denying a Motion for Mistrial because of these incidents, the trial court said:

> "The Court has carefully considered the matter of the motion for a mistrial and the same is hereby overruled. The Court views there are no, and have been at no time, *any aggravating* matters here. There has been no indication of an *intentional approach* here; everything seems to be in the manner of a *careful approach* to the matter. There has been no circumstance which would indicate that the defendant here would be prejudiced by the continuation of this trial. The Court expects to, and probably will, give very careful and distinct instructions in this matter. The motion for new trial is—or for a mistrial is in every aspect overruled. The Court has considered carefully the citation of authorities submitted to the Court by the defendant in this cause. The same is hereby overruled" (pp. 69-70). (Emphasis ours.)

This petitioner was found guilty on the one count indictment, upon which verdict judgment entered.

On June 27, 1963, appellant Smith was sentenced to confinement in a Federal penal institution for a period of twenty years, subject to the provisions of Title 18, U. S. C. 4208 (a) (2).

Appeal was taken to the United States Court of Appeals for the Eighth Circuit from that conviction in No. 17,449 Criminal, reported as *Smith* v. *United States*, 331

F. 2d 265. The points argued on that appeal were as follows:

"1. That this appellant was grossly prejudiced in the circumstances by the calling of his named co-defendant as a court's witness, and his repeated invocation of his privilege against self-incrimination.

"2. That, by calling the co-defendant, Dalia, for the sole purpose of having him admit to his prior plea of guilty, deprived this appellant of his absolute right to have the charges presented determined by the evidence presented against him and not by what happened with regard to a criminal prosecution against someone else. This was further aggravated by the Court's telling the jury that the indictment brought by the Grand Jury, named Dalia and the appellant jointly.

"3. That, though the government was allowed to cross-examine Dalia, his claim of right to refuse to be cross-examined by this appellant was sustained, in absolute violation of the Sixth Amendment to the Constitution of the United States.

"4. That evidence was introduced against the appellant without a showing of ownership or possession, and remote as to place and time, and conviction rested on interference built on inference.

"5. That expert opinion testimony supporting his theory of defense was denied this appellant, and, that this denial was especially aggravated by foreclosing opportunity to counteract the effect of the testimony of the government's expert witness" (Appellant's Brief, page 24).

The conviction was affirmed and in its original ruling in *Smith* v. *United States,* 331 F. 2d 265, said relative to the Dalia incident as follows:

"Such building of a hedge in order to rely thereon as error is like the knocking down of a straw man

which one has created for that very purpose and effect." *Smith* v. *United States*, 331 F. 2d 265, 276.

A Petition for a Writ of Certiorari was filed in this Court, and the questions presented were as follows:

> "1. Where a Court's witness' testimony was, in substance, an admission that he pleaded guilty, where the other Government evidence against the Petitioner was entirely circumstantial, and where the Judge told the jury that the Court's witness was charged together with the Petitioner, are the adverse inferences arising from the witness' repeated invocation of the testimonial privilege cured by an admonition by the Court that the invocations are not to be given any weight?
>
> "2. Where the evidence showed an association between the Petitioner and his co-defendant (who was not on trial), and the co-defendant's testimony amounted to nothing more than admissions that he had pleaded guilty to the charge for which Petitioner was then on trial, has not Petitioner's right to be tried solely on the evidence against him, rather than the admission of another's guilt, been violated?
>
> "3. When a co-defendant, not on trial, called as a Court's witness, stands mute under cross-examination by a defendant on trial, and his testimony given under examination by the prosecution is allowed to stand, will the Sixth Amendment tolerate conviction?
>
> "4. Is not the exercise of this Court's supervisory power required where conviction most probably rests on inferences from repeated invocations of the Fifth Amendment and the admission of a co-defendant's pleas of guilty; where the constitutional right of cross-examination is allowed to be frustrated; and where that constitutional right is arbitrarily cut off?" Petition for Certiorari, No. 160, October Term, 1964, pp. 2-3.

Certiorari was denied. (379 U.S. 824) A Petition for Rehearing was filed to the Supreme Court bringing its

attention to the applicability of *Jesse Elliott Douglass* v. *State of Alabama,* 380 U.S. 415, which this Petitioner considered appropriate relative to the Dalia testimony. The Petition for Rehearing was denied (379 U.S. 940).

On December 7, 1964, this Petitioner moved, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, to reduce the sentence. The grounds urged for such reduction were as follows:

> "The Defendant is presently 44 years of age, he has a wife with a heart condition and two married sons.
>
> "During the transaction out of which this conviction arose as the Court knows, a serious automobile accident occurred. As a result of that accident, the defendant suffered severe chest and leg injuries. Further, his brother was killed as a result of that accident, and the support of his brother's widow and two juvenile children became his obligation, which he assumed.
>
> "The record of the defendant includes five convictions and sentences for respectively, theft for interstate shipment, grand larceny and robbery, possession of burglar tools, burglary and unlawful flight to avoid prosecution. He has had only one prior conviction of burglary, and that is a state conviction in Waukesha.
>
> "It has been developed by investigation that in the fiscal years 1962, 1963, and 1964, 36 defendants were convicted in United States District Courts and sentenced to ten or more years imprisonment for bank burglary, Title 18, Section 2113 (a). In those years not one person in the Southern District of Iowa received a sentence of ten years or more. In fact, in Iowa, the Northern District, no defendant has received in excess of ten years since the fiscal year 1962. A breakdown of these sentences is appended hereto as Exhibit A.
>
> "Of the said 36 convictions, 20 were for a period of ten years, three for a period of twelve years, two for

a period of fourteen years, eight for a period of fifteen years, two for a period of eighteen years and only one other than this for a period of twenty years.

"Investigation disclosed that the 20 year sentence issued out of the Western District of Oklahoma in 1962 concerned one Benny Peoples. The probation officer, upon request, reviewed the file and the file disclosed that said Benny Peoples had the following record: (a) 7 years for larceny. (b) 2 years for theft of animals. (c) 12 months for theft. (d) 25 years for armed robbery. (e) 5 years for an unidentified crime. (f) 15 years for bank burglary. (g) 20 years for bank burglary in Case No. 19038.

"The Court will note the distinctions in the record of Benny Peoples and this defendant. We are unable to determine what other considerations went into the imposition of this severe punishment for Benny Peoples.

"Investigation was also made of the sentence imposed in the Northern District of Mississippi in 1962, Case No. 61-13, listed on Exhibit A as being for a period of 18 years. We were unable to locate any case that terminated in August of 1961, in which such said sentence was imposed. However, our research did develop a sentence for a violation of Section 2113 (a), of Title 18, United States Code, in that case, No. 61-13, wherein a sentence of 15 years was imposed upon one Bobby Gene Johnson, for violation of that Section. Simultaneously with the imposition of that sentence, another 15 year concurrent sentence was imposed in 61-28 for the same type of offense and a concurrent 5 year sentence was simultaneously imposed upon that defendant for a violation of Section 2113 (c) of Title 18, United States Code.

"Investigation further disclosed that the other 18 year sentence was imposed upon one Rex Eugene Peck in the Western District of Missouri in June of 1963, in Cause No. 5440. The conviction there rested upon burglary of *four banks* in the State of Missouri.

"The attention of the Court is respectfully directed to the punishment given the co-defendant Dalia. His conviction of 12 years was to run concurrently with another 12 year conviction for the robbery of another bank. As a further aggravated circumstance at the time the charges were brought against him, the co-defendant Dalia was on parole. In this regard, we would respectfully direct the Court's attention to a recent decision of the United States District Court for the Western District of North Carolina, *Perkins* v. *State of North Carolina,* 234 F. Supp. 333, where the Court said at page 337:

" 'The moderation of North Carolina judges in this respect is probably the reason why the Legislature has not long since felt required to amend the statute. If the usual five year sentence is "right" then twenty to thirty years is "wrong". Certainly twenty to thirty years is unusual. There can be no justification for such disparity of punishment. But the sentence is within the astounding statutory limit of "not less than five nor more than sixty years", and it is well settled that within statutory limits even the harshest sentence, absent exceptional circumstances, is not cruel and unusual within the meaning of the Constitution.

" 'Is such an exceptional circumstance present here? The co-defendant in the same indictment who pleaded nolo contendere was sentenced to five to seven years; whereas Perkins who pleaded not guilty and subjected the court to affording him trial by jury was sentenced to twenty to thirty years. It is easy to suspect that Perkins may have been punished for insisting upon his right to trial by jury. Indeed, court-appointed counsel concedes that Perkins *may* have been punished in part for pleading not guilty. But the inference is of doubtful validity. Perkins and his co-defendant, McCorkle, were apparently quite different in background and in previous homosexual conduct. Although the difference is not enough to justify the extreme disparity of punishment, it is enough to cast

doubt upon what otherwise might be inferred; that his not guilty plea inconvenienced the court and that he was punished for it.' *Perkins* v. *State of North Carolina,* 234 F. Supp. 333, 337.

"We respectfully request the Court to consider that there was no violence involved in the crime of which this defendant has been convicted. There was no danger to human life. There is nothing in this defendant's background to indicate violence, yet armed robbery, a despicable crime of violence, carries a maximum of only 25 years.

"We direct the Court's attention to the fact that when the police officer came upon the defendant, and his companions, there was no attempt or evidence of disposition to do the police officer harm. The only attempt and disposition was flight. Certainly three men of violence were in control against a single police officer on a deserted country road. The evidence did not even disclose offensive weapons in the possession of this defendant and his companions.

"Since the law is settled that the sentences may be imposed up to the legal maximum without coming within the scope of cruel and unusual punishment under the Constitution, the sole recourse of this defendant is to this Court under the Federal Rules of Criminal Procedure.

"The defendant also shows that since the occurrence of October 22, 1962, the basis of this conviction, he has not come into any conflict with law enforcement.

"The usual incidents that compel the imposition of the maximum sentence are not present here." Motion To Reduce Sentence.

The District Court ordered a hearing on the Motion for Reduction, which hearing was had on January 25, 1965. The portions of that argument pertinent to this Petition are:

"Miss Lavin: There is a facet of this that I would like to give expansive consideration to and that is the

more precise question of whether Mr. Smith for the acts of which he was found guilty did not receive a sentence in excess of that intended by Congress to be imposed.

"The facts as Your Honor will recall are in the absence of all bank personnel and without deadly weapons or means of violence in the night the Altoona State Bank was entered and goods of the approximate amount of $6,000 were taken and carried away.

"The statute under which the Indictment here was brought, Section 2113 of Title 18, is a very lengthy one but we're concerned here with only subsections (a) and (b) of that statute, and I would like to direct Your Honor's attention to it.

"The first paragraph of subsection (a) does not relate to the peculiar circumstance here. The second paragraph is the paragraph under which this Indictment was brought: 'Whoever enters a bank or other saving and loan association,' continuing, 'with the intent to commit a felony therein,' and it goes on to say, 'felony or any larceny.'

• • •

"The subsection (b) reads: 'Whoever takes or carries away with intent to steal or purloin any money or property, or other things of value, exceeding $100, belonging to or in the care, control and custody of any bank or savings and loan association, shall be fined no more than $5,000 and imprisoned not more than ten years.'

"I submit to the Court that under the plain reading of the statute the facts stated would fit the language of either the entry provision—the entry with larcenous intent provision of the second paragraph of subsection (a), which carried a permissible maximum of twenty years or it would fit the larceny provisions of subsection (b) which carries a permissible sentence of ten years.

"The Indictment, as I said, in this case was cast in the language of the felonious entry provisions with

the permissible maximum of twenty years, even though only had the completed act been charged as a completed act, and as it was proved that there was a completed act of larceny, only a ten year sentence is permitted and the face of the proposition, I submit to the Court, it seems incongruous that a frustrated attempt to commit a larceny carries twice the punishment as the completed larceny. I recognize that while it seems basically incongruous, we are not unacquainted with statutes that allow the fragmentation of crimes for the purposes of punishment. However, this statute appears under the cases to be unique.

"The Supreme Court in *Prince* v. *United States,* 352 U.S. 322, distinguished this statute from other statutes that allow fragmentation. It indicated that this statute is in a class by itself. I would like to read to the Court, and you'll forgive me reading a rather lengthy—

"The Court: You may read. The Court is familiar with the Prince case, but you may do so.

"Miss Lavin: Very well, since Your Honor is familiar with it I will read those portions that I think are particularly applicable here.

"The Court: All right.

"Miss Lavin: After stating the reasons for the amendment of the Act in 1937, the Court has said at page 328: 'It is a fair inference from the wording of the Act, uncontradicted by anything in the meager legislative history, that the unlawful entry provision was inserted to cover the situation where a person enters a bank for the purpose of committing a crime, but is frustrated for some reason before completing the crime,' and here, of course, Your Honor, is our distinction, the Supreme Court saying that the entry provisions only when we have a frustrated crime, and then they continue on speaking of the completed, or comparing this with the completed offense that we find in subparagraph (b): 'The gravamen of the offense'—this is the entry provision—'is not in the acts of

entering which satisfies the terms of the statute, even if it is simply walking through an open public door during normal business hours. Rather the heart of the crime is the intent to steal. This mental element merges into the completed crime if the robbery is consummated. To go beyond this reasoning would compel us to find that Congress intended by the 1937 amendment to make drastic changes in authorized punishments. This we cannot do. If Congress had so intended, the result could have been accomplished easily with certainty rather than by indirection.' And the Court continues: 'We hold, therefore, that when Congress made either robbery or an entry for that purpose a crime, it intended that the maximum punishment for robbery should remain at twenty years, but that even if the culprit should fall short of accomplishing his purpose, he could be imprisoned for twenty years for entering with the felonious intent. While reasonable minds might differ on this conclusion, we think it is consistent with our policy or not attributing to Congress, in the absence of criminal statute, in the enactment of criminal statutes, an intention to punish more severely than the language of its laws clearly imports in the light of pertinent legislative history.'

"Now, following the *Prince* case, the Fifth Circuit in *Williams* v. *United States*, 265 F. 2d 236, stated it very clearly—the principle upon which we urge this Court to reduce the sentence in this cause.

"In that case there was a count brought under the second paragraph of subsection (b) carrying the twenty-year maximum, and two substantive counts were brought. The Fifth Circuit stated: 'We do not think it was the purpose of the Congress to impose a greater penalty for entering a bank with the intent to commit a felony where no felony was in fact committed than could be imposed where the unlawful entry was followed by the larceny of the property in the bank. We think this view is in harmony with both the *Prince* case and the *Heflin* case.' In other words, if the Court please, the Fifth Circuit has interpreted

these statutes so that the attempted entry would not be—would not consistently be twice the amount that one give for the completed offense.

"The Seventh Circuit in *United States* v. *Drake*, 250 F. 2d 216, and this Circuit in *Siminov* v. *United States*, 162 F. 2d 314, have announced the purpose of the varying degrees of punishment in Section 2113, and quoting therefrom: 'We believe it to be now settled that Section 2113 of Title 18, U. S. C. A. creates a single offense with various degrees of aggravation permitting sentence of increasing severity.'

"The Tenth Circuit which—

"The Court: You are not smacking upon the legality of the pronouncement, are you?

"Miss Lavin: I am submitting to the Court that the intention of Congress was that an attempt should not be in excess of the completed offense.

"The Court: Well, I want to know. Are you smacking on the legality of the sentence?

"Miss Lavin: I think it's a matter that can't be avoided; yes, sir." Transcript of Record Re Motion to Reduce Sentence, pgs. 5-10.

Pursuant to such argument had, the District Court on March 5, 1965, overruled the Motion to Reduce Sentence stating as follows:

"Defendant has moved under Rule 35 of the Federal Rules of Criminal Procedure to have the sentence reduced and corrected.

"The sentence is within the limits provided in the statute and is not illegal. Sentence was imposed pursuant to Section 4208 (a) (2). No matter of any nature or kind has been presented to this court which has not been carefully studied by the court and found to be insufficient to make any reduction of sentence.

"It Is, Therefore, Hereby Ordered that the motion for reduction is overruled in its entirety and in each of its 17 separately numbered paragraphs."

This Petitioner entered on service of the judgment of conviction and commitment on the day after Thanksgiving, 1964. He subsequently filed his Motion, pursuant to Section 2255 of Title 28, United States Code, attacking that sentence. This was done in the form of a civil action pursuant to Local Rule 26 of the Rules of the United States District Court for the Southern District of Iowa, which requires the institution of an original civil action on forms provided by the Clerk of that Court. That Motion, in the nature of a civil action, contended that the sentence imposed upon this petitioner was invalid on the following grounds:

> "(a) The second paragraph of Section 2113 (a) is unconstitutional and void.
>
> "(b) Section 2113 is unconstitutionally vague and uncertain.
>
> "(c) The defendant was illegally charged.
>
> "(d) The sentence is in excess of that authorized by law.
>
> "(e) The indictment on which defendant was found guilty and sentenced fails to charge a crime under the statutes of the United States.
>
> "(f) The indictment, conviction and sentence are contrary to the intent of Congress.
>
> "(g) The defendant was convicted on illegal evidence, was wrongfully deprived of his right of cross-examination, and the Court acted on a mistake of fact.
>
> "(h) The defendant's conviction was upheld on a mistake of fact of the United States Court of Appeals for the Eighth Circuit.
>
> "(i) Deprivation of opportunity for cross-examination resulted in an unfair conviction."

Grounds (g) (h) and (i) above were supported by an affidavit by Frank Dalia as follows:

"Frank Anthony Dalia, being on oath first duly sworn, deposes and says that:

"He was indicted by the Federal Grand Jury for the Southern District of Iowa, Central Division, on December 13, 1963, in cause entitled United States of America v. Harry R. Smith, and Frank Anthony Dalia, a/k/a Anthony Walters, Cause Criminal No. 4-903 on a charge of having entered the Altoona State Bank in Altoona, Iowa, on October 22, 1962, with the intent to commit a felony, to wit: larceny;

"Pending disposition of said indictment, he was released on bond in the amount of $20,000;

"In order to obtain release on bond it was required that security be posted for the protection of the surety;

"Thereafter this affiant and one George Cason were arrested and charged of having entered a bank in the said State of Indiana on December 30, 1962, and being unable to make bond remained in the custody in the Marion County Jail;

"His arraignment in this district in the said cause Criminal No. 4-903 was continued on several occasions by the Honorable Roy Stephenson, Judge, until February 28, 1963, at 9:00 a. m. when the arraignment was called for this affiant, and said affiant did not appear in person, though he was represented by his counsel, Richard A. Strickler;

"His failure to appear was occasioned by his detention in the Marion County Jail, as aforesaid;

"Then and there, on the said February 28, 1963, the United States Attorney, Donald Wine, moved that affiants bond be forfeited, and an order of forfeiture was entered on said motion, and the home of his brother was then put in jeopardy since it had been pledged as security to the surety;

"Thereafter, in the earlier part of April, 1963, affiant was visited in Marion County Jail by his attorney, Richard A. Strickler, and consulted with him relative to a Motion to Vacate the Bond Forfeiture;

"He was advised by the said Richard A. Strickler that the United States Attorney had advised him that he would uphold vacation unless this affiant entered a plea of guilty under Rule 20 within a short date, in which event he would not oppose the vacation of the forfeiture;

"Until he was faced with the choice of pleading guilty for causing the loss of his brother's home, it was the intention of this affiant, to go to trial on the charges made against him, particularly since he had been advised by his counsel in Indianapolis, P. K. Ward, that in the District Court at Indianapolis, it was the practice to impose like sentences whether guilt was found on a plea or after trial;

"On or about the 25th day of April, 1963, he entered his plea of guilty pursuant to the provisions of Rule 20 of the Federal Rules of Criminal Procedure in the said Criminal No. 4-903; waived pre-sentence investigation; and, the Court advised that it would await a report from the Federal Bureau of Investigation;

"On April 30, 1963, sentence was imposed upon him for a period of twelve (12) years in the custody of the Attorney General of the United States;

"On that date he made an appointment with his attorney, P. K. Ward, to consult with him on the following Monday;

"However, on May 1, 1963, two United States Marshals came to him and told him they were taking him to Iowa, and he was driven to the City of Des Moines and lodged in the County Jail;

"On or about the early part of May, 1963, his Des Moines attorney, Richard A. Strickler came to see him in said County Jail and told him that the Government had brought him down as a witness against Harry R. Smith, charged with affiant in Cause Criminal No. 4-903;

"This affiant told his counsel that he was in need of legal advice since there was a state charge for

possession of burglar tools outstanding against him;

"His counsel, Richard A. Strickler, told him he was unable to advise him as to his procedure on the trial of Harry R. Smith, since he was a government witness and since Mr. Strickler was counsel for the defendant Harry R. Smith;

"Mr. Strickler told the affiant to ask the Court to appoint counsel to advise him;

"Three or four days thereafter, this affiant was brought to the bull pen in the District Court, at which time he told the United States Marshal that he wished to consult with counsel;

"Within a few minutes thereafter a well dressed gentleman with a brief case approached him and told the affiant that he understood the affiant wished to speak to an attorney and asked him about what he wished to speak to counsel. This affiant recognized the well dressed gentleman as an agent of the Federal Bureau of Investigation, and declined to talk with him further;

"Thereafter on the 14th day of May, 1963, while this affiant was waiting outside the Courtroom prior to his testimony, in the custody of the United States Marshal and one of his deputies, the said United States Marshal stated that when the affiant had asked for an attorney, he, the United States Marshal went to the United States Attorney and told the United States Attorney of the request;

"The United States Marshal said he next saw the F. B. I. agent approaching the affiant;

"The United States Marshal said he then went to see the judge and explained all of what had transpired to the judge;

"When this affiant was called to the stand, he attempted to invoke his privilege against self-incrimination to all questions propounded to him, but being without professional advice, his attempts were clumsy and ineffectual;

"When, finally, the Court asked him if he wished the advice of counsel, he said he did, and Mr. Frank Oliver, of Chicago, was employed by his wife, he consulted with him and advised him that he had a right to stand mute, which he did when thereafter questioned by Mr. Lawyer, another of the counsel for Harry R. Smith;

"Further Affiant Sayeth Not."

Finding that the Motion required no hearing, the United States District Court for the Southern District of Iowa ruled as follows:

"This submission is predicated upon a motion pursuant to Section 2255, Title 28, United States Code.

"The applicant has predicated his petition upon nine separately enumerated grounds. The motion itself, the files, and the records of this cause and all subsequent rulings of the trial court, the Circuit Court of Appeals, and the Supreme Court of the United States conclusively show that no relief from any of the premises urged is warranted. All matters urged have been thoroughly litigated and passed upon by all the courts involved. No hearing upon the petition requiring the production of the prisoner is necessary. Accordingly, after considering all aspects of the motion, the court finds that the same should be overruled.

"Accordingly, It Is Hereby Ordered, Adjudged, and Decreed that the motion be and the same is hereby overruled." Memorandum and Order filed June 24, 1965.

Notice of Appeal from that Order was filed on July 2, 1965.

The United States Court of Appeals for the Eighth Circuit recognized that there were seven grounds advanced for vacating the sentence:

"1. The second paragraph of 18 U.S.C.A. §2113(a) is unconstitutional and void;

"2. Section 2113(a) is unconstitutionally vague, uncertain, and contradictory, in that it proscribes conduct which is not criminal in nature;

"3. Since the larceny was completed by appellant, the entry with intent merged into the completed crime, and prosecution for entry with intent, under the second paragraph of §2113(a), was improper;

"4. The sentence imposed is in excess of that authorized;

"5. The indictment was sufficient;

"6. The conviction is contrary to the intent of Congress in enacting §2113.

"Additionally, appellant complains of the failure of the court to conduct a hearing on the motion." *Smith* v. *United States,* 8 Cir., 356 F. 2d 868, 870.

As to the first point, this petitioner argued that when, in 1948, Section 588b, Title 12, United States Code (the predecessor Section 2113(a)) was amended, it was made clear that, though an entry to commit a felony was limited to the extent that the felony be one affecting an insured bank and against the laws of the United States, the entry to commit *any* larceny was not so limited. To the argument that it was in excess of Congress to sanction the entry into a bank, the funds of which were insured by the Federal Deposit Insurance Corporation, with intent to commit in such bank *any* larceny, the Eighth Circuit found it "convincingly clear that it is a federal offense to take and carry away, with intent to steal, *any property* or *any thing* belonging to, or in the care, custody, or control, management or possession of any federally insured bank." 356 F. 2d at 871.

In the argument that where, in circumstances where the larceny is shown to have been completed, the entry with

intent to commit the larceny merges into the completed crime, and prosecution under the entry provisions of Section 2113(a) is improper, the Eighth Circuit found no merit. (356 F. 2d at 872)

The Eighth Circuit found the argument of this Petitioner that the indictment fails to allege the elements necessary to a violation of federal law, a subject only of direct attack, and unavailable by collateral attack under Title 28, U.S.C., Section 2255.

The Eighth Circuit found frivolous the contention of this Petitioner that the purpose of Congress in enacting the statute (2113) was not to supercede the State authorities, but that the Federal Government should intervene only to cooperate with local authority when the local authorities were unable to cope with the criminals.

The Eighth Circuit rejected our arguments that an evidentiary hearing on issues of fact, as supported by the affidavit of the co-defendant Dalia, was required.

REASONS FOR GRANTING THE WRIT

This Court should issue its Writ of Certiorari to review the decision of the Court of Appeals for the Eighth Circuit for the following reasons:

1. The Eighth Circuit has interpreted this Court's decision in *Jerome* v. *United States,* 318 U.S. 101, as standing for the proposition that *"any larceny"* in Section 2113(a) to mean that "any larceny from a bank within the federal banking system [F.D.I.C.] is covered by the Act and made a federal offense." *Jerome* stands clearly for the proposition that "felonies", including larcenies, embrace only offenses which are already felonious under federal law and affect banks protected by the Act. The Eighth Circuit has, thus, decided that Section 2113(a)

extends the protection of the Government of insured banks beyond the federally insured funds into its private property in excess of the limitations of the Tenth Amendment, and is actually contrary to this Court's holding in *Jerome* v. *United States,* 318 U.S. 101.

2. When Congress amends a statute to proscribe the entry into a bank with intent to commit "any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny . . ." the Courts are without power to modify that legislation to interpret "any larceny" to be limited to the same extent that Congress has modified "any felony."

3. The Eighth Circuit has extended and approved the permissible powers of federal legislation over banks operating under the laws of a State to the same extent that Congress may legislate regarding banks operating under the laws of the United States in clear violation of the Tenth Amendment to the Constitution of the United States.

4. Enchancing punishment at the discretion of the prosecutor is contrary to this Court's policy of lenity recognized in *Ladner* v. *United States,* 358 U.S. 169; *Bell* v. *United States,* 349 U.S. 81; and *Prince* v. *United States,* 352 U.S. 322.

5. The doctrine of merger of the proscriptions of § 2113 announced by this Court in *Prince* v. *United States,* 352 U.S. 322, while generally recognized by the Courts, has been avoided only in the pleading discretion of the prosecutor, who shuns pleading the offense as completed in order to enhance permissible punishment. This is such a departure from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

I and II.

The second paragraph of Section 2113 (a) of Title 18, U. S. C., reads as follows:

> "Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—
>
> "Shall be fined not more than $5,000.00 or imprisoned not more than 20 years or both."

Prior to 1948, the words "affecting such bank or such savings and loan association and in violation of any statute of the United States" were not part of the statute. The amendment was made in response to a ruling of the United States Supreme Court in *Jerome* v. *United States,* 318 U.S. 101. In that case an attack was made on the statute on the ground that the proscription of the commission of a felony, *any* felony, not limited to the authorized legislating power of the United States was in excess of the powers of Congress and an invasion of the States' right and power to legislate under the 10th Amendment to the Constitution of the United States.

The United States Supreme Court, in saving the statute from a declaration of unconstitutionality, ruled in the *Jerome* case that inherent in the statute, before amendment, was the limitations that "any felony" so committed

must be a felony in violation of the laws of the United States and did not apply to just any felony. The Eighth Circuit recognized the limitation of *Jerome* in this case.

> "In Jerome v. United States, 318 U.S. 101, 63 S. Ct. 483, 87 L. Ed. 640 (1943), the Supreme Court resolved the issue by deciding that 'felony' embraced only offenses which are felonies under federal law and affect banks protected by the Act." *Smith* v. *United States,* 8 Cir., 356 F. 2d 868, 870.

Five years later, with full knowledge of the decision of the United States Supreme Court in *Jerome* the amendment was made to read:

> "any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny."

It thus becomes apparent that the limitations put on other felonies was not put on the commission of the larceny, and that the larceny need not be in violation of any statute of the United States, but could be a larceny in violation of the common law or as defined by statutes of the States.

It is our submission that the statute as it attempts to sanction an entry into a bank, only the deposits of which are insured by the Federal Government, and the larceny not being limited to such deposits, is an attempt to legislate by the Congress in excess of its powers and in an area reserved to the states and in excess of its powers granted by Article 1, Section 8, Clause 18 of, and in violation of the Tenth Amendment to, the Constitution of the United States.

The federal qualification on felony being omitted from "any larceny", entry onto privately owned property to commit the larceny, solely offensive to local law is, within the purport and language of the section, as amended in 1948, violative of the limitations on powers granted to

Congress under the Constitution and its Amendments.

The saving interpretation of "felony" in the *Jerome* case can no longer be ascribed to Congress in its legislation subsequent to the *Jerome* case, where Congress articulated the limitation on other felonies, but allowed the larceny provisions to continue unfettered.

> "It is well-settled that 'There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.' United States v. American Trucking Ass'ns, 310 U. S. 534, 543, 60 S. Ct. 1059, 1063, 84 L. Ed. 1345. As we pointed out in Girard Inv. Co. v. Commissioner, 3 Cir., 122 F. 2d 843, 845, 846, words may be interpolated in a statute '* * * only when the statutory language is equivocal or where literal interpretation leads to aburdity "so gross as to shock the general moral or common sense."' See Fides v. Commissioner, 4 Cir., 137 F. 2d 731. In its most recent ruling on the subject of statutory construction, the Supreme Court in Crane v. Commission, 67 S. Ct. 1047, 1051, stated: 'In the first place the words of statutes—including revenue acts—should be interpreted where possible in their ordinary, everyday senses. * * * Strong contervailing considerations would be required to support a contention that Congress, in using the word "property", meant "equity", or that we should impute to it the intent to convey that meaning.'
>
> "In Caminetti v. United States, 242 U. S. 470, 37 S. Ct. 192, 196, 61 L. Ed. 442 L. R. A. 1917 F. 502, Ann. Cas. 1917B, 1168, the Supreme Court held that language '* * * must be taken as the final expression of legislative intent and * * * (is) not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source.'" *Hatfried, Inc.* v. *Commissioner of Internal Revenue,* 162 F. 2d 628, 631.

III.

Only the funds of the Altoona State Bank were insured by the federal government. The furniture, the equipment, the building, everything other than the funds were privately owned. We submit there is no area where the federal government may legally legislate other than in regard to the insured funds. We submit that, if entry is made into the bank to snatch a ball point, to pick a pocket, Congress has, by the second paragraph of Section 2113(a), said a federal crime has been committed. This is, we submit, beyond the power of Congress.

Nonetheless, the Eighth Circuit, purporting to rely on this Court's decision in *Westfall* v. *United States,* 274 U.S. 356 and *Jerome* v. *United States,* concluded otherwise:

> "Congress is empowered to legislate in regard to a state bank which chooses to come into the banking system created by the United States. With this premise in mind, we conclude that contrary to appellant's thesis, *Jerome* stands for the proposition that *any* larceny from a bank within the federal banking system is covered by the Act and is made a federal offense." *Smith* v. *United States,* 8 Cir., 356 F. 2d 868, 871.

Several reasons militate against the application of the *Westfall case.*

First, the Altoona State Bank was operating under the authority of State charter, under the Laws of the State of Iowa. A national bank, such as was involved in *Westfall,* is chartered by the United States Government and therefore operated under the laws of the United States. The Federal Deposit Insurance Corporation is a regulatory agency of the United States Government but does not control any bank, either national or state. A state bank may not be a member of the Federal Reserve System and still be a member of the Federal Deposit Insurance Corpo-

ration. Under the Federal Deposit Insurance Corporation, and umbrella of protection of the United States Government is limited to defalcation, embezzlement, and wilful misapplication of funds. In fact, Title 12 U.S.C. § 1828(e) provides:

> "The Corporation may require any insured bank to provide protection and indemnity against burglary, defalcation, and other similar insurable losses. Whenever any insured bank refused to comply with any such requirement the Corporation may contract for such protection and indemnity and add the cost thereof to the assessment otherwise payable by such bank."

Obviously if the protection of the Federal Deposit Insurance Company extended to burglary, private insurance would not be appropriate, and legislation directed to what is recognizably privately insured is not within the ambit of the Federal Deposit Insurance Corporation's power and authority, and thus without the power and authority of Congress to regulate or control.

We recognize the implied power of Congress to legislate, including provision for criminal punishment, where the United States Government has a vested interest. But there is no source of authority for the Congress to legislate beyond the limits of the Federal Deposit Insurance Corporation's insurance policy. The United States Government does not have a vested interest beyond its protection for defalcation, embezzlement and wilful misapplication of funds. Until the Federal Deposit Insurance Corporation is able to extend its coverage and protection against robbery, burglary and larceny, Congress is without authority to enact statutes for the punishment for these crimes, in reliance upon the insurance of the funds by the Federal Deposit Insurance Corporation. Unless the Federal Deposit Insurance Corporation extends its limits of coverage as aforesaid, the Tenth Amendment will not

permit Congress to legislate in the manner in which the Eighth Circuit has interpreted that it had legislated.

Congress may legislate and federal authorities may supercede state authorities regarding the crimes of robbery, burglary, and larceny, but only when they affect federal reserve and national banks, and when those banks are "operating under the laws of the United States" as opposed to state banks operating under the authority and laws of the state but simply "whose funds are insured by the F.D.I.C."

We do not question the Congress may legislate and federal authorities may supersede the state if the crime committed falls within the limits, protection, and coverage of the F.D.I.C. insurance, but it may not legislate, nor may the federal authorities supersede the state if robbery, burglary, or a larceny is committed beyond the insured coverage of the F.D.I.C. against a state bank operating under the laws of the state.

We submit the limitation of Congress in this type of situation be made clear in all cases, but especially clear in the instant case of a state bank burglarized locally with no interstate flight involved.

Reliance upon *Westfall* v. *United States,* 274 U.S. 256, is glaringly misplaced, not only because the bank involved there was a member of the Federal Reserve System, and operating under the laws of the United States, but also because it was an embezzlement case and embezzlement is covered by the F.D.I.C. insurance policy thereby allowing federal authorities in this limited sphere to supersede the state's basic authority to regulate local crime.

The decision of the Eighth Circuit does not elaborate on what constitutes the source of authority of Congress to legislate making it a federal offense to steal a ball point.

pen from a state bank on the basis of the insurance of funds by the Federal Deposit Insurance Corporation (356 F. 2d at 870). That must be because there is no such authority. The second paragraph of Section 2113(a) making a federal offense the entry into a state bank with intent to commit therein *any* larceny is in excess of the legislative power of Congress and should be declared unconstitutional.

IV and V

It would appear under the plain reading of the statute that the facts stated would fit the language of either the entry with larcenious intent provisions of the second paragraph of Sub-paragraph (a), which carries the permissible maximum of 20 years, or under the larceny provision of Sub-paragraph (b) which allows for a permissible maximum of one year should the larceny be of goods for a value of less than $100, or for ten years should the goods stolen be for a value of in excess of $100. The indictment in this cause was cast in the language of the felonious entry provisions with the permissible maximum of 20 years, even though, had the completed act been charged, as the completed act was proved, no more than a strict ten year sentence would have been permitted. On the face of the proposition it seems incongruous that a frustrated attempt to commit a larceny carries twice the punishment of the completed larceny. Yet, we are not unacquainted with statutes that allow for the fragmentation of crimes for purposes of punishment. However, this is not such a crime. The Supreme Court in *Prince* v. *United States,* 352 U. S. 322, distinguished this statute from other statutes that allow such fragmentation. It indicated that this statute is in a class by iself. In that case, the Supreme Court held:

"In addition to the Court of Appeals cases on the precise question, the petitioner and the Government cite as analogous other cases that involved fragmentation of crimes for purposes of punishment. None of these is particularly helpful to us because we are dealing with a unique statute of limited purpose and an inconclusive legislative history. * * *

"The original Bank Robbery Act was passed in 1934. 48 Stat. 783. It covered only robbery, robbery accompanied by an aggravated assault, and homicide perpetrated in committing a robbery or escaping thereafter. In 1937 the Attorney General requested that the Act be amended. In his letter proposing the bill, the Attorney General declared that 'incongruous results' had developed under the existing law. He cited as a striking instance the case of

> '* * * a man (who was arrested in a national bank while walking out of the building with $11,000 of the bank's funds on his person. He had managed to gain possession of the money during a momentary absence of one of the employees, without displaying any force or violence and without putting anyone in fear—necessary elements of the crime of robbery—and was about to leave the bank when apprehended. As a result, it was not practicable to prosecute him under any Federal statute.'

"The Act was amended accordingly to add other crimes less serious than robbery. Two larceny provisions were enacted: one for thefts of property exceeding $50, the other for lesser amounts. Congress further made it a crime to

> '* * * enter or attempt to enter any bank * * * with intent to commit in such bank or building, or part thereof, so used, any felony or larceny * * *.'

"Robbery, entering and larceny were all placed in one paragraph of the 1937 Act.

"Congress provided for maximum penalties of either a prison term or a fine or both for each of

these offenses. Robbery remained punishable by 20 years and $5,000. The larceny penalties were set according to the degree of the offense. Simple larceny could result in 1 year in jail and $1,000 fine, while the maximum for the more serious theft was set at 10 years and $5,000. No separate penalty clause was added for the crime of unlawfully entering. It was simply incorporated into the robbery provision.

"The Government asks us to interpret this statute as amended to make each of completely independent offense. It is unnecessary to do so in order to vindicate the apparent purpose of the amendment. The only factor stressed by the Attorney General in his letter to Congress was the possibility that a thief might not commit all the elements of the crime of robbery. It was manifestly the purpose of Congress to establish lesser offenses. But in doing so there was no indication that Congress intended also to pyramid the penalties." *Prince* v. *United States,* 352 U. S. 322, 325-327.

Following the *Prince* case, the 5th Circuit in *Williamson* v. *United States,* 265 F. 2d 236, stated the principle upon which we urge the merger of attempt into the complete offense.

"We do not think it was the purpose of the Congress to impose a greater penalty for entering a bank with the intent to commit a felony where no felony was in fact committed than could be imposed where the unlawful entry was followed by the larceny of the property of the bank. We think this view is in harmony with both the Prince case and the Heflin case. See Counts v. United States, 8 Cir., 263, F. 2d 603." *Williamson* v. *United States,* 265 F. 2d 236, 238.

And the Sixth Circuit in *United States* v. *Machibroda,* 338 F. 2d 947 said at page 949:

"The sentences attacked herein are for offenses which merged completely into the robbery counts when the robberies were completed." *United States* v. *Machibroda*, 6 Cir., 338 F. 2d 947, 949.

This Court in interpreting its own decision in *Jerome* in *Heflin* v. *United States*, 358 U.S. 415, said at page 419:

"We held in *Prince* v. *United States, supra*, that the crime of entry into a bank with intent to rob was not intended by Congress to be a separate offense from the consummated robbery. We ruled that entering with intent to steal, which is 'the heart of the crime,' *Id.*, 352 U.S. at page 328, 77 S. Ct. at page 407, 'merges into the completed crime if the robbery is consummated'. *Ibid.* We gave the Act that construction because we resolve an ambiguity in favor of lenity when required to determine the intent of Congress in punishing multiple aspects of the same criminal act."

Recently in *Hall* v. *United States*, 356 F. 2d 424, the Fifth Circuit recognized that under the Federal Bank Robbery Statute, the crime of entry into the bank with intent to rob is not a separate offense from the consummated robbery and that the crime of entering merges with the consummated crime if the robbery is completed.

The statute clearly sets forth a one or a ten year penalty for the completed larceny. To enhance that penalty by ten or nineteen years by an arbitrary fragmentation of the offense at the option of the prosecutor has always been soundly condemned. Whenever an ambiguity arises, be it from inadequate draftsmanship or Congressional oversight, the position of the Courts has been that federal crimes shall not be judicially enlarged. The following expressions of that policy by the United States Supreme Court are germane to that issue:

"This policy of lenity means that the Court will not interpret a Federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner* v. *United States,* 358 U. S. 169, 178.

"When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or anti-social conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment." *Bell* v. *United States,* 349 U. S. 81, 83.

"While reasonable minds might differ on this conclusion, we think it is consistent with our policy of not attributing to Congress, in the enactment of criminal statutes, an intention to punish more severely than the language of its laws clearly imports in the light of pertinent legislative history." *Prince* v. *United States,* 352 U. S. 322, 329.

CONCLUSION

Wherefore, it is respectfully submitted that:

(1) Insurance of the funds of a State Bank by the Federal Deposit Insurance Corporation against embezzlement, defalcation and wilful misapplication gives Congress no authority to legislate concerning larcenies from such a bank;

(2) The Eighth Circuit erred in expanding Section 2113(a) to modify "any larceny" to include that the larceny must be from the bank and that the insurance of funds against defalcation, embezzlement, and wilful misapplication

brings the State Bank within the Federal Banking System and covers any larceny against it or on its premises;

(3) The Eighth Circuit's interpretation of Section 2113(a) constitutes Congress legislating in excess of its powers in violation of the Tenth Amendment to the Constitution of the United States;

(4) Enhancing punishment, rather than enforcing the recognized policy of lenity in ambiguous statutes, conflicts with the letter and the spirit of punishment so often enunciated by this Court;

(5) The doctrine of merger of the attempt portion of Section 2113 into the completed crime, as enunciated by this Court in *Prince* v. *United States,* 352 U.S. 322 has been avoided by the expediency of discretionary pleading;

And this Court should issue its Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit to resolve and clarify these important problems.

Respectfully submitted,

MAURICE J. WALSH
ANNA R. LAVIN
Attorneys for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 18,091

Harry R. Smith, Appellant,
v.
United States of America, Appellee.

Appeal from the United States District Court for the Southern District of Iowa.

[February 23, 1966.]

Before VAN OOSTERHOUT, MATTHES and MEHAFFY, Circuit Judges.

MATTHES Circuit Judge.

Appellant, Harry R. Smith, was indicted for entering a federally insured bank with intent to commit a felony; to wit, a larceny, in violation of 18 U.S.C.A. §2113(a).[1] He was found guilty by a jury and was sentenced to prison for a term of twenty years. His conviction was affirmed. *Smith* v. *United States*, 331 F.2d 265 (8 Cir.

[1] "§ 2113. (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank * * *; or

"Whoever enters or attempts to enter any bank * * * with intent to commit in such bank * * * any felony affecting such bank * * * and in violation of any statute of the United States, or any larceny—

"Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both."

1964), cert. denied, 379 U.S. 824, rehearing denied, 379 U.S. 940. Thereafter, appellant moved, pursuant to Rule 35, F.R.Cr.P., for a reduction of the sentence. After a hearing, the court, on March 5, 1965, denied the motion. One June 7, 1965, appellant filed a motion, pursuant to 28 U.S.C.A. § 2255, to vacate the sentence. That motion was, after due consideration, also denied, and this appeal follows.

Six points are presented by appellant as grounds for vacating the sentence:

1. The second paragraph of 18 U.S.C.A. §2113(a) is unconstitutional and void;

2. Section 2113(a) is unconstitutionally vague, uncertain and contradictory, in that it proscribes conduct which is not criminal in nature;

3. Since the larceny was completed by appellant, the entry with intent merged into the completed crime, and prosecution for entry with intent, under the second paragraph of § 2113(a), was improper;

4. The sentence imposed is in excess of that authorized;

5. The indictment was insufficient;

6. The conviction is contrary to the intent of Congress in enacting § 2113.

Additionally, appellant complains of the failure of the court to conduct a hearing on the motion.

Section 588b, Title 12 U.S.C.A., the predecessor of § 2113(a) provided:

> "[W]hoever shall enter or attempt to enter any bank • • • with intent to commit in such bank • • •

> any felony or larceny, shall be fined * * * or imprisoned * * * or both."

The use of the term "felony", without limitation, caused confusion as to whether a common law, state, or federal felony was meant to be included. In *Jerome* v. *United States,* 318 U.S. 101 (1943), the Supreme Court resolved the issue by deciding that "felony" embraced only offenses which are felonies under federal law and affect banks protected by the Act. As a result of *Jerome,* the Congress, in 1948, amended the Act to provide:

> "Whoever enters or attempts to enter any bank * * * with intent to commit in such bank * * * any felony affecting such bank * * * and in violation of any statute of the United States, or any larceny—."

Relying principally upon *Jerome,* appellant submits that the "limitations put on other felonies was not put on the commission of the larceny, and that the larceny need not be in violation of any statute of the United States, but could be a larceny in violation of the common law or as defined by statutes of the States. * * * The federal qualification on felony being omitted from 'any larceny', entry onto privately owned property to commit the larceny, solely offensive to local law is, within the purport and language of the section, as amended in 1948, violative of the limitations on powers granted to Congress under the Constitution and its Amendments." The appellant suggests that the only larceny which could constitutionally be prohibited by this statute would be larceny of bank funds insured by the federal government and that the larceny of anything else, such as a ballpoint pen or a check protector, is not properly within the purview of the statute.

The Supreme Court recognized in *Jerome* and in *Prince* v. *United States,* 352 U.S. 322 (1957), and explicitly held

in *Westfall* v. *United States*, 274 U.S. 256 (1927), that Congress is empowered to legislate in regard to a state bank which chooses to come into the banking system created by the United States. With this premise in mind, we conclude that, contrary to appellant's thesis, *Jerome* stands for the proposition that *any* larceny from a bank within the federal banking system is covered by the Act and is made a federal offense. Thus, the court indicated that the statute was sufficiently definite as to "larceny" and solely concerned itself with defining "felony" when it stated, at p. 106:

> 'In the second place, Congress defined in § 2(a) robbery, burglary, and *larceny* but not felony. We can hardly believe that, having defined three federal offenses, it went on in the same section to import by implication a miscellaneous group of state crimes as the definition of the fourth federal offense." (Emphasis supplied).

In fact, consideration of § 2113(b), in its entirety, makes it convincingly clear that it is a federal offense to take and carry away, with intent to steal, *any property*, or *any thing* belonging to, or in the care, custody or control, management or possession of any federally insured bank.[2] The expressions of the Supreme Court in *Prince* v. *United States*, supra, 352 U.S. 322, in regard to the legislative history of § 2113, lend support to the validity of our conclusion. And, as appellant frankly recognizes, in *United States* v. *Poindexter*, 293 F.2d 329 (1961), cert. denied, 368 U.S. 961, the Sixth Circuit sustained the conviction for the theft of a check protector from a federally insured bank.

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[2] The first paragraph §2113(b) applies to thefts of property having a value in excess of $100, whereas the second paragraph of that subsection provides that it is an offense to steal property having a value not exceeding $100. The punishment varies according to the value of the property stolen.

Appellant's second contention, i.e., that § 2113(a) is unconstitutionally vague, uncertain and contradictory, is not supported by any authority, and we find it utterly without merit. The strong presumptive validity that attaches to an Act of Congress has led the Supreme Court to hold that statutes are not automatically invalidated as vague simply because difficulty is encountered in determining whether certain marginal offenses fall within their language. *United States* v. *National Dairy Products Corp.*, 372 U.S. 29 (1963), at p. 32; *Dean Rubber Mfg. Co.* v. *United States*, . . . F.2d . . . . (8 Cir. Feb. 8, 1965). We have examined this statute in light of the claimed infirmities and in light of all pertinent principles enunciated in *National Dairy*, supra, and are satisfied that it is immune from the attack of constitutional vagueness.

In *Prince* v. *United States*, supra, the Supreme Court was confronted with the question of the merger of offenses under the Federal Bank Robbery Act. There, the defendant had been given consecutive sentences of twenty years for the robbery and fifteen years for the entering. In holding the sentences illegal, the court stated, *inter alia*, at p. 328:

> "• • • The gravemen of the offense is not in the act of entering, which satisfies the terms of the statute even if it is simply walking through an open, public door during normal business hours. Rather the heart of the crime is the intent to steal. This mental element merges into the completed crime if the robbery is consummated."

Appellant relies generally upon the *Prince* opinion and, more particularly, upon the above quoted language, as authority for his contention that, inasmuch as a larceny from the bank was committed, the entry merged into the completed crime and, therefore, the prosecution should have

been for the completed larceny, under subsection (b) of § 2113, which allows a maximum penalty of ten years. We disagree.

Since the decision in the *Prince* case the merger issue has not infrequently been presented to the Courts of Appeals. See, *Kitts* v. *United States,* 243 F.2d 883 (8 Cir. 1957) where we ruled illegal a sentence of ten years for larceny which had been superimposed upon a sentence of twenty years for entering with intent to commit a felony; *LaDuke* v. *United States,* 253 F.2d 387 (8 Cir. 1958), where we upheld a conviction under the entry provision, although the larceny had been completed. Accord: *Purdom* v. *United States,* 249 F.2d 822 (10 Cir. 1957), cert. denied, 355 U.S. 913; *Counts* v. *United States,* 263 F.2d 603 (5 Cir. 1959), cert. denied, 360 U.S. 920; *United States* v. *Williamson,* 255 F.2d 512 (5 Cir. 1958), cert. denied, 358 U.S. 941. We deem it unnecessary to restate the courts' views in upholding convictions for entry with intent to commit a felony, even though the felony had been completed. Unlike the situation in *Prince,* appellant was not prosecuted, convicted, and given consecutive sentences for the offense of entering and for the completed crime; thus, there has been no pyramiding of sentences which the Supreme Court struck down in the *Prince* case.

The merger argument is an integral part of appellant's contention that the sentence imposed is in excess of that authorized by law. We find no merit in this assignment. The punishment meted out to appellant was concededly within the range specified by the applicable statute, and is beyond our control. *Flores* v. *United States,* 238 F.2d 758 (9 Cir. 1956); *Granger* v. *United States,* 275 F.2d 127 (5 Cir. 1960); *Jones* v. *United States,* 327 F.2d 867, 879-870 (D.C. Cir. 1963). The fact that the sentence imposed

exceeded appellant's expectation,[3] or that the maximum penalty sanctioned by the statute is greater than the maximum authorized for other federal offenses does not vest us with power to interfere. *Verdon* v. *United States,* 296 F.2d 549, 553-554 (8 Cir. 1961), cert. denied, 370 U.S. 945; *Baker* v. *United States,* 334 F.2d 444, 449 (8 Cir. 1964).

Appellant also attacks the sufficiency of the indictment, claiming that it is fatally defective, because it failed to allege that: the intent was to commit the larceny "in such [a federally protected] bank"; the larceny affected "such bank"; and, the larceny was "in violation of a statute of the United States".

Appellant did not challenge the sufficiency of the indictment in his former appeal, although he was represented by the same able and experienced lawyers who initiated this proceeding and who are prosecuting this appeal.[4]

It is well settled that the sufficiency of an indictment is not open to collateral attack, by motion to vacate sentence, in the absence of exceptional circumstances.[5] *Jackson* v. *United States,* 325 F.2d 477, 478-479 (8 Cir. 1963), and cases there cited. Here, there is no showing of the existence of any circumstances which could render the indict-

[3] In all probability, the district judge, in assessing the maximum penalty, took into consideration not only the nature of the offense but also that appellant, according to his brief filed in this appeal, previously had been convicted five times for theft from interstate shipment; grand larceny and robbery; possession of burglar tools; burglary and unlawful flight to avoid prosecution; and burglary, respectively.

[4] We have some difficulty in understanding why appellant's retained lawyers, who are demonstrably well versed in criminal law and experienced in handling criminal cases on every level, failed to present and advocate any of the instant contentions in the appeal from the judgment of conviction.

[5] The indictment alleged that appellant and his co-defendant entered the Altoona, Iowa, bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, with intent to commit felony, to wit, a larceny, in violation of Title 18 U.S.C.A. § 2113(a).

ment vulnerable to attack in a collateral proceeding. The point is rejected.

The gist of appellant's sixth point is that he should have been prosecuted by the Iowa authorities, in the Iowa state courts, and not by the federal authorities in the federal court. The contention is patently frivolous. The fact that appellant was arrested by local county authorities in the same county in which the crime was committed, was lodged in the county jail, and was delivered by local authorities to the federal authorities for prosecution, does not detract from the legal consequences attending the entry of the federally insured bank for an illegal purpose. Appellant violated a federal statute and subjected himself to prosecution in the federal court.

None of the grounds enunciated in appellant's motion required the court to conduct a hearing, and we must rule that appellant's contention in this regard is without substance. The six points we have discussed, supra, clearly presented legal questions and a factual hearing was not called for, and would not have aided either the court or appellant. We suspect, from an examination of the last three asserted grounds for relief appearing in appellant's motion, filed in the district court, that what he really desired was another opportunity to relitigate the question whether he had effectively been denied the right to cross-examine Dalia, his named co-defendant, or was otherwise prejudiced by the circumstances surrounding the cross-examination.[6] This issue was exhaustively explored in our former opinion, 331 F.2d 265. Cases are legion holding that a motion pursuant to 28 U.S.C.A. § 2255 is not

[6] Paragraphs (g), (h) and (i) of appellant's motion alleged, in substance, that appellant was convicted on illegal evidence and wrongfully deprived of the right of cross-examination; that appellant's conviction was upheld by this court on a mistake of fact; that the inferences from Dalia's refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination.

a substitute for, and does not serve the office of, an appeal, *Springer* v. *United States,* 340 F.2d 950 (8 Cir. 1965), and that issues disposed of by the court of appeals on review of the original judgment will not be reviewed in a collateral attack by motion pursuant to § 2255. Additionally, we observe, once again, that *Townsend* v. *Sain,* 372 U.S. 293, 312-319 (1963) does not dictate that an evidentiary hearing is required in all cases. *Harris* v. *Tahash, Warden,* . . . F. . . . (8 Cir. Dec. 2, 1965); *Copenhaver* v. *Bennett, Warden,* . . . F. . . . (8 Cir. Feb. 1, 1966). As we observed in the latter case, at p. . . . :

> "The district courts clearly have discretion to utilize reasonable procedures to ascertain whether the claim is substantial before granting a full hearing. * * * '* * * each application is to be disposed of in the exercise of a sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought * * *'".

We have studied the entire record before us and the contentions of appellant and are convinced that no legal grounds have been presented justifying vacation of the judgment and sentence. The order appealed from is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT

UNITED STATES COURT OF APPEALS
For The Eighth Circuit.

No. 18,091. September Term, 1965

(Filed Feb 23 1966)

Harry R. Smith, Appellant, vs. United States of America.	}	Appeal from the United States District Court for the Southern District of Iowa.

This cause came on to be heard on the original files of the United States District Court for the Southern District of Iowa, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Order of the said District Court appealed from in this cause, dated June 24th, 1965, be, and the same is hereby, affirmed.

February 23, 1966.

Order entered for the Court
in accordance with Opinion:

/s/ Robert C. Tucker
Clerk, U. S. Court of Appeals
for the Eighth Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 167

HARRY R. SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 356 F. 2d 868.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1966 (Pet. App. 10a). The petition for a writ of certiorari was filed on May 24, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the conviction in this case constituted a valid application of 18 U.S.C. 2113(a).

2. Whether petitioner was properly sentenced under 18 U.S.C. 2113(a) rather than under sub-paragraph (b) of the same section.

STATUTE INVOLVED

18 U.S.C. 2113 provides:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—
>
> Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.
>
> (b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or
>
> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100

belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

* * * * *

STATEMENT

After a trial by jury in the Southern District of Iowa, petitioner was convicted under an indictment charging that he entered a federally insured bank with intent to commit a larceny in violation of 18 U.S.C. 2113(a). Petitioner was sentenced to twenty years' imprisonment and the conviction was affirmed on appeal. *Smith* v. *United States,* 331 F. 2d 265, certiorari denied, 379 U.S. 824. After petitioner began serving his sentence he filed a motion under Rule 35, F.R. Crim. P., to reduce the sentence. This motion was denied and no appeal was taken. Thereafter, petitioner filed a motion under 28 U.S.C. 2255 to vacate the sentence. The denial of this motion was affirmed by the court of appeals (Pet. App. 1a–9a; 356 F. 2d 868).

The evidence at trial, the sufficiency of which has never been questioned, showed that petitioner, his brother and another, named Dalia, broke into a federally insured bank and burglarized its night-deposit safe. They were apprehended the same night after a desperate flight which ended in the death of petitioner's brother (331 F. 2d at 268).

ARGUMENT

1. Petitioner urges that the bank robbery act (18 U.S.C. 2113(a)), which broadly prohibits larceny from federally insured banks, may validly be applied only

to thefts of the "insured funds" of state banks (Pet. 27) and not to other bank property. The Federal Deposit Insurance Act (12 U.S.C. Ch. 16), however, generally insures the ability of a bank to meet the demands of its depositors.[1] Congress is thus legitimately concerned with the soundness of the insured banks and this concern justifies the broad prohibition placed by Section 2113(a) upon thefts of the property of such banks. Cf. *Westfall* v. *United States*, 274 U.S. 256. The facts of this case, moreover, do not in any sense pose the questions of the ultimate limits of federal power which the petitioner suggests would be raised by prosecution for the theft of property seemingly unrelated to the bank's financial position. Petitioner and his confederates stole, not pens or check writing machines (see Pet. 29), but the actual deposits of the bank's customers, an act clearly within the area of permissible federal protection of the bank's ability to meet depositor's demands.

2. There is no substance to petitioner's argument (Pet. 30–34) that punishment had to be imposed in this case under 18 U.S.C. 2113(b)—providing for a maximum prison sentence of ten years—rather than under 18 U.S.C. 2113(a)—providing a maximum sentence of twenty years—merely because the theft was consummated. Subsection (a), under which peti-

[1] The Act provides: "Whenever an insured bank shall have been closed on account of inability to meet the demands of its depositors, payment of the insured deposits in such bank shall be made by the Corporation as soon as possible * * *" 12 U.S.C. 1821(f). The Federal Deposit Insurance Corporation may terminate the insurance of a bank whose practices it regards as "unsafe or unsound" 12 U.S.C. 1818(a).

tioner was prosecuted, applies to thefts or attempted thefts involving either personal violence or intimidation or illegal entry. Subsection (b), on the other hand, provides a lower penalty for completed thefts—such as embezzlements—which may not contain this element of violence or unlawful entry. Since petitioner's crime—a nighttime burglary—clearly contained the extra element of unlawful entry necessary for prosecution under Subsection (a), he was properly charged and sentenced under that subsection even though he may also have violated the terms of Subsection (b) by consummating a theft. See *United States* v. *Williamson,* 255 F. 2d 512 (C.A. 5), certiorari denied, 358 U.S. 941; *Purdom* v. *United States,* 249 F. 2d 822 (C.A. 10), certiorari denied, 355 U.S. 913. The rule in *Prince* v. *United States,* 352 U.S. 322, relied upon by petitioner, requires only that the court may not cumulate the penalties under the two subsections; it does not require prosecution for the lesser crime where the greater was committed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
ANTHONY P. NUGENT, JR.,
Attorneys.

JUNE 1966.

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